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NO. _____

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

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GARY W. JUSTICE, PETITIONER

v.

JOHN W. DENNIS, RESPONDENT

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

I. MUST AN ARRESTEE, OR IN THE ALTERNATIVE, A PRETRIAL DETAINEE, PROVE THAT A STATE POLICE OFFICER'S USE OF FORCE WAS BOTH INSPIRED BY MALICE OR SADISM AND SO SEVERE BRUTAL AND DEMEANING THAT IT SHOCKS THE CONSCIENCE OF A COURT IN ORDER TO ESTABLISH THAT THE FORCE WAS UNCONSTITUTIONALLY EXCESSIVE AND UNREASONABLE IN A 42 U.S.C. § 1983 CIVIL ACTION?

II. ARE THE PHRASES "INSPIRED BY MALICE AND SADISM" AND "SHOCKS THE CONSCIENCE OF A COURT" IMPERMISSIBLY CONFUSING AND VAGUE WHEN USED IN THE JURY INSTRUCTION?

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The petitioner, Gary W. Justice, respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on November 25, 1987.

## OPINIONS BELOW

The November 25, 1987 en banc opinion of the United States Courts of the Appeals for the Fourth Circuit is reported at 834 F.2d 380, and is reprinted in the Appendix hereto, p. A-2, infra (hereinafter "App.").

The June 16, 1986 panel opinion of the Court of Appeals is reported at 793 F.2d 573, and is reprinted App. A-49. On September 30, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. A-47.

The March 7, 1985 judgment of the United States District Court for the Eastern District of North Carolina (Charles K. McCotter, Jr., Magistrate) has not been reported but is set forth at App. A-84.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were issued on November 25, 1987. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 as well as the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

The provisions of the above statutes and constitutional amendments are set out in the Appendix hereto, App. A-138-142.

## STATEMENT OF THE CASE

### A. The Facts

On or about November 19, 1982, Gary W. Justice was arrested on a charge of driving under the influence by North Carolina State Highway Patrolman W. B. Rose. Justice was taken to the North Carolina Highway Patrol Station in Onslow County, North Carolina and given a breathalyzer test. He was then taken to the office of the Onslow County Magistrate where bond was set. Trooper John W. Dennis of the North Carolina State Highway Patrol accompanied Trooper W. B. Rose to the Magistrate's office and subsequently accompanied Rose and Justice to the Onslow County Jail. During the time that these actions were taking place, Justice admitted that he was, at times, loud, obnoxious and used

profane language. Justice denied, however, that he offered any resistance. Trooper Rose and Trooper Dennis testified that upon entering the Onslow County Jail, Justice kicked an empty chair causing it to fall over. Justice denied kicking the chair but testified that he unintentionally bumped into an empty chair. Justice was at times, while in the Onslow County Jail, loud, and used abusive language.

Justice was placed in a small room with cement walls near the booking area of the Onslow County Jail. This room was capable of being locked, but neither John Dennis nor W. B. Rose obtained a key to this room or locked it. They could have obtained the key from the jailer. At this time, and during the entire time which is relevant to the

actions given rise to this lawsuit, Gary W. Justice continuously had his hands cuffed behind him.

While Gary W. Justice was still handcuffed, he walked out of the small room in which Trooper Rose had told him to wait until he could be booked and turned over to the custody of the jailer. When Justice walked out, Trooper Dennis seized Justice by either the throat, according to Justice, or the neck, according to Dennis, and proceeded to apply sufficient pressure to leave visible marks the following morning on the sides of Justice's neck and throat area. While Justice was handcuffed and breathing hard with Dennis holding him by either the neck or throat and applying severe pressure, Justice testified that he was breathing hard.

His air flow was being restricted, and some saliva which was dribbling from his mouth flew through the air and struck John Dennis on the mouth. Dennis believed that Justice intentionally spit on him, although Justice testified this was accidental. Dennis then immediately turned Justice's head away from Dennis and propelled Justice into a cement wall with sufficient force to crack or break Justice's teeth. Immediately after pushing Justice into the cement wall and breaking his teeth, Dennis was handed a can of mace by Officer Gary Dixon of the Jacksonville Police Department who was in the jail booking area along with a number of other law enforcement officers. Dennis immediately sprayed Justice in the face with mace. After shoving Justice into the wall and macing

him, Dennis and Trooper Rose laid Justice down to take off his boots prior to placing him in a cell. Trooper Dennis testified that, at that time, Justice told Trooper Dennis to look at what he had done to his teeth. Trooper Dennis then testified that at that point he apologized to Justice and told him with much regret that he hated to see that his tooth was cracked.

Although Trooper Rose testified that he did not see Dennis push Justice into the cement wall, both Dennis and Justice testified that this happened.

At the time that Justice was pushed into the cement wall, Dennis testified that there was no need for any extreme method of subduing Justice and that Justice was neither attempting to escape nor able to escape from the area where

he was. Dennis further testified the main reason he turned Justice around and pushed Justice toward the wall was because Justice spit on him and he wanted Justice out of his face and did not want him spitting in his face. Dennis further testified that it made him angry when Justice spit on him but that his intent was not to hurt Justice.

Dennis admitted that at the point he pushed Justice into the brick wall, Justice could not have been dangerous to anyone. Dennis further testified, when asked if he was in imminent fear that Justice would physically harm him in any way when he pushed Justice toward the wall, that he could have speculated Justice could have kicked him but did not think that crossed Dennis's mind right then. Rather, it was the fact

that Justice spit in his face which caused Dennis to push Justice into the cement wall. Dennis described his state of mind at this time as anger, frustration and ready to get rid of Justice.

Dennis testified that he used the mace pretty much on instinct because it was handed to him and that he could have still probably controlled Justice without it.

According to Dennis, the North Carolina Highway Patrol is not issued mace and had not been issued mace for several years prior to this incident. At no time during this incident did Dennis call for assistance from other officers, although a number of other officers were present, and Dennis could have gotten assistance from them if he had asked for it.

There is some discrepancy in Dennis's testimony as to whether or not Justice at some point actually kicked Dennis. At one point, Dennis swore that Justice kicked him but that this occurred as he and Trooper Rose were laying Justice down to take off his boots, which was after Justice had been shoved face first into the cement wall and then sprayed with mace. At another point, Dennis indicated that Justice had actually kicked at and made contact with Dennis's shin prior to the time that Justice pushed Dennis into the wall. Justice consistently denied kicking Dennis at all. At all events, by Dennis's own admission, he never pushed Justice into the wall and sprayed him with mace for any reason other than the spitting.

After laying Justice down, although he continued to struggle, Dennis and Trooper Rose had no problem removing his boots and placing him in a cell, according to Dennis.

Justice suffered two broken teeth, soreness of the Adam's apple where Dennis grabbed him by the throat and pain from being sprayed in the face with mace. In a pretrial order, attorneys for Justice and Dennis stipulated that Justice was injured in the jail area of the Onslow County Courthouse. Justice's broken teeth resulted in extensive dental treatment and dental expenses in the sum of Eight Hundred Ninety Dollars ($890.00).

**B. Proceedings in the Courts Below**

This action was commenced by Gary W. Justice filing a complaint in the

United States District Court for the Eastern District of North Carolina on June 29, 1983, pursuant to 42 U.S.C. § 1983 for violating Justice's constitutional rights due to Dennis's unjustified use of brutal and excessive force against Justice. Subject matter jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Dennis filed an answer. This action was tried on March 5, 6 and 7, 1985 by consent of the parties before the Honorable Charles K. McCotter, Jr., United States Magistrate, and a jury. Both parties moved to direct a verdict. Both motions were denied. The jury returned a verdict for Dennis on the issue of liability after the court gave jury instructions to which counsel for Gary W. Justice

objected and which instructions formed the basis of the questions presented in this petition for writ of certiorari. The entire jury instructions were set out at App. A-89.

The specific portion of the jury instruction to which the petitioner objects is as follows:

> Members of the jury, you are instructed to use the following standard for determining the amount of force necessary to make the defendant liable.
>
> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock the conscience of a court.
>
> You must determine whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of offical power literally

> shocking to the conscience. App. A-106-107.

Plaintiff also requested a jury instruction for the correct constitutional standard as follows:

> The jury returned a verdict for defendant on March 7, 1985 and judgment was entered thereon. Plaintiff gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, on April 25, 26, 1985.

**C. Proceedings in the Court of Appeals**

On appeal, Petitioner argued before the Appellate Court, as he had before the trial court that the Fourth Amendment to the United States Constitution prohibiting unreasonable seizures, as made applicable by the Fourteenth Amendment's due process clause, applied to this case. Petitioner argued that the correct standard for liability, upon which the

jury should have been instructed, was one of reasonableness under the totality of the circumstances, citing Tennessee v. Garner, 481 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) and Kidd v. O'Neill, 774 F.2d 1252 (1985). On appeal before the Fourth Circuit, Respondent, for the first time, argued that the Fourth Amendment protections, and did not apply to Petitioner's situation since he had been taken before a magistrate and bond had been set prior to the occurrence of this incident. Petitioner filed a reply brief in which he pointed out that the State of North Carolina had treated Petitioner as an arrestee rather than a pretrial detainee by charging him with resisting arrest under state law for actions relating to this incident. Petitioner further pointed out that even

if the Fourth Amendment protections do not apply, substantive due process required that the jury be instructed on a reasonableness under the totality of the circumstances' standard and that of all events the jury should not have been instructed that Petitioner had to prove that Respondent was motivated by malice or sadism in order to establish liability for violation of his constitutional rights. Petitioner further argued that he should not have had to prove that the conduct shocked the conscience of a court in order to establish liability and the jury should not have been so instructed. Petitioner further argued that he had requested the proper instruction of reasonableness under the totality of circumstances.

Petitioner also argued that the use of language in a jury instruction such as motivation by "malice" and "sadism" and "shocking to the conscience" were confusing and vague. Petitioner pointed out that what a jury considers malice or sadism may be different from a court's interpretation.

On June 6, 1986, a panel of the Court of Appeals, with Judge Hall dissenting, held that Justice was a pretrial detainee and that the source of his constitutional protection against the use of excessive force was grounded in the Fifth and Fourteenth Amendments. The court further held that the challenged jury instruction requiring motivation by malice or sadism was not required in order to establish a constitutional violation. The court

noted that the language was taken from Johnson v. Glick, 481 F.2d 1028, cert. den., 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). The court further noted that Johnson v. Glick, listed the above language as factors. The court then held Johnson to mean that "proof of malice will elevate the common law causes of action to constitutional courts, but is not required to prove the constitutional court." The panel also held that recklessness, wantonness or gross and inculpable negligence may be sufficient for a 1983 excessive force claim and that proof of bad motive, evil intent or alterior purpose is not required. In addition, the panel opinion held that the "shocks the conscience" instruction given by the trial court in the present case was

flawed. After noting that Smith v. Wade, 461 U.S. 30, 50-51, 103 S.Ct. 1625, 1637-38, 75 L.Ed.2d 632 (1983), suggested a vagueness challenge to an instruction imposing § 1983 liability if the conduct "shocks a sensibility," the court held that if a "shocks the conscience" instruction was given it must be faithful to Rochin and proceeded to require such an instruction made clear that the conscience at issue is that of the community in light of involving societal norms, not that of any particular judge or court. The court further held that by focusing on words such as "brutality," "demeaning," and "literally shocking" without explaining them, the instruction suggested an overly high threshold of liability. The panel reversed and remanded for a new trial. App. A-49.

On September 30, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. A-47. On November 25, 1987, the en banc court affirmed the jury instruction given by the lower court in the present case, relying primarily on Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).[1]

The court further held that although constitutionally excessive force is force that is unreasonable under the circumstances the inquiry must

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[1] Hall involved a substantive due process challenge to corporal punishment in the public schools rather than excessive force by a police officer. Hall contained language like that used in the jury instruction which required proof of inspiration by malice or sadism and conduct shocking to the conscience of a court and did not indicate that these were factors rather than the constitutional standard.

not cease at that point. The jury must also determine if the officer has exceeded the bounds of the privilege which police officers have to use force and that whether motivation by malice and sadism is a principal factor, or is a description of the level of conduct that overcomes the applicable privilege makes little practical difference. The majority decision appears to apply to all excessive force cases rather than to be limited to Fifth Amendment substantive due process protections although the majority opinion does indicate that the Fifth Amendment applies to the present case.

Judge Phillips, in a dissent joined by Chief Judge Winter and Judge Ervin, would have reversed the trial court rather than affirming it. In dissent,

Judge Phillips pointed out that the Fourth Amendment right of a person to be secure in his person against unreasonable seizure was involved in the present case and gave two alternative theories for finding such a right. The first theory is that, without regard to when one technically becomes a pretrial detainee, he does not thereby lose all of his Fourth Amendment rights to be secure in his person against unreasonable searches and seizures citing Winston v. Lee, 470 U.S. 753, 755, 105 S.Ct. 1611, 1614, 84 L.Ed.2d 662 (1985). Judge Phillips said also Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967), has long settled that a seizure of a person within the Fourth Amendment's meaning is not limited to conduct that constitutes

a technical arrest and encompasses any conduct that has in some way restrained the liberty of the citizen by physical force.

Judge Phillips further points out that even if a technical arrest must be considered to have a duration past the initial point at which it could be said the person is in custody, he would have no trouble in the present case finding such a technical arrest either by employing the notion of rearrest to cover the situation where an arresting officer has to forceably subdue a person already in custody, see e.g., Gross v. State, 86 Ind. 581, 117 N.E. 562 (1917), or holding that an arrest lasts as long as the arresting officer retains custody of the person arrested so that Fourth Amendment protections against

unreasonable uses of force applied throughout that period, citing Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985); see also, Lester v. City of Chicago, 830 F.2d 706, 713 n.7 (7th Cir. 1987). Judge Phillips' dissent further points out that Petitioner need only prove that under the particular circumstances, the force used in subduing him exceeded that which reasonably could have been considered necessary to take him and maintain him in lawful custody, citing Tennessee v. Garner, supra, Kidd v. O'Neill, supra, Lester v. City of Chicago, supra, and Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985)(en banc). App. A-23.

## REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND, SEVENTH AND NINTH CIRCUITS.

The Court of Appeals en banc opinion in the present case, App. A-2, clearly indicates that a trial court may instruct a jury that proof of motivation by malice or sadism is necessary to show a violation of unconstitutional rights in excessive force cases where Fifth Amendment substantive due process is implicated. The majority opinion in the present case says that it makes little difference whether this requirement is imposed because it is a principal factor which must be met or whether it must be proven in order to show that some police privilege can only be overcome by proving inspiration by malice or sadism.

The contention that proof of motivation by malice or sadism is necessary to establish liability for violation of substantive due process rights protected by the Fifth and Fourteenth Amendments has been flatly rejected by the United States Court of Appeals for the Second Circuit. In Fiacco v. City of Rensselaer, 783 F.2d 319, 325-326 (2nd Cir. 1986), the court held that even a jury finding that defendant police officers did not act maliciously or wantonly was not sufficient to overturn a jury verdict finding violation of plaintiff's constitutional right to be free from excessive force. Fiacco proceeded both before the trial court and before the Court of Appeals on a Fifth and Fourteenth Amendments due process theory. In Fiacco the jury was

instructed, on the constitutional standard, that although a police officer has the right to use such force as necessary under the circumstances, he may not use force that is unreasonable, unnecessary or violent. Id. at 325.

The majority's en banc opinion assumes, in the present case, that Justice's claim was for violation of rights secured by the Fifth Amendment rather than the Fourth Amendment. App. A-11. Justice, of course, had been arrested by Trooper Rose and taken by Rose and Dennis before a magistrate prior to the time this incident occurred. Justice, however, was still in the custody of Troopers Rose and Dennis and had not been turned over to the custody of the jailer when he was pushed into a brick wall and sprayed

with mace. Both the Ninth and Seventh Circuits have held that for purposes of the Fourth Amendment standards, once a seizure has occurred it continues throughout the time the arrestee is in the company of the arresting officers. Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985); Lester v. City of Chicago, 830 F.2d 706, 713, n. 7 (7th Cir. 1987).[2] The court in Lester specifically held that where Fourth Amendment protections are applicable, an objectively unreasonable seizure violates the Constitution regardless of an officer's good intent and that likewise, an objectively unreasonable

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[2] Footnote 7 in Lester, at 713 points out that when the alleged acts in that case occurred Ms. Lester had not been formally charged and bail had not been set, citing the panel opinion in the present case. This portion of the footnote is dicta in that case.

seizure does not violate the Constitution despite the officer's bad intent. 830 F.2d at 712. To the extent that the majority en banc opinion in the present case applies to Fourth Amendment rights, which is clearly what the court intends, the majority en banc opinion directly conflicts with the Seventh Circuit's opinion in Lester v. City of Chicago, for Lester specifically overrules Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985) and holds that with respect to excessive force cases in violation of the Fourth Amendment, a subjective inquiry into a police officer's motives to determine if he acted with malice and his actions therefore shocked the conscience are not required. 830 F.2d at 712.

With regard to the question of Fourth Amendment protections against unreasonable seizures, the decision of the majority in the present case, App. A-2, further conflicts with applicable decisions of the United States Court of Appeals for the Ninth Circuit. As previously pointed out, Robins v. Harum, supra, holds that these protections apply as long as a person is in the company of the arresting officer. In addition, the Ninth Circuit in McKenzie v. Lamb, 738 F.2d 1005, 1011, has held:

> The reasonableness of force should be analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted. (citation omitted)

In Smith v. City of Fontana, 818 F.2d 1411, 1416 (9th Cir. 1987), the court

followed the decision of this Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), and held that a reasonableness standard for Fourth Amendment violations is required. The court in that case further held that reasonableness should be evaluated in the light of the factors defined in McKenzie v. Lamb, and quoted those factors. 818 F.2d at 1416. Nowhere in its Fourth Amendment analysis did either McKenzie v. Lamb, supra, or Smith v. City of Fontana, supra, even require analysis of inspiration by malice and sadism, much less motivation. Neither case required a "shocks the conscience" test to show a Fourth Amendment violation.

Smith v. City of Fontana, supra, further undertook to analyze substantive

due process claims of the decedent's estate. In that analysis, Smith also used a reasonableness standard, but did quote from Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1987), that factors such as the need for application of force, the relationship between the need and the amount of force used, the extent of injury, and whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm were factors to which courts must look. Even under its focus upon these factors, the court nowhere indicated that proof of inspiration by malice or sadism is a requirement for imposing liability of substantive due process violations.

Only one other circuit, the Fifth, has gone as far as the Fourth Circuit in the present case and required inspiration by malice or sadism in order to establish a constitutional violation. Compare, Hendrix v. Matlock, 782 F.2d 1273 (5th Cir. 1986)(4th Amendment unreasonable seizure in arrest) with Stevens v. Corbell, 832 F.2d 884 (5th Cir. 1987)(excessive force while booking an arrestee into jail). But see, Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987), which rejected a claim that plaintiff must show deputy sheriffs acted with malicious and sadistic intent in subjecting a prisoner to solitary confinement in an extremely cold cell and in forcing the prisoner to sleep on the floor where rats crawled over him.

The court further held that treatment of the prisoner did not arise out of the situation posing significant risk to the rights of inmates and prison staff and thus the prisoner was only required, under the Eighth Amendment, to show that infliction of pain was unnecessary and wanton, distinguishing Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). 833 F.2d at 54, 55.

Every other circuit which has considered the issue has concluded, at least by implication, that inspiration by malice or sadism is at most only a factor to be considered, along with other factors, in determining a constitutional violation but none have required inspiration by malice or sadism

in excessive force cases.[3] There can be no doubt that this issue will persist. The Second Circuit will continue to apply a standard to substantive due process claims that requires only proof that the force used is unreasonable,

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[3] D. C. Circuit: Norris v. District of Columbia, 737 F.2d 1148 (D.C. Cir. 1984), a substantive due process case for excessive force used on a jail inmate. The court adopted a "shocks the conscience" standard, citing Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). The court went on to allow analysis of the Johnson v. Glick factors, but noted that Judge Friendly in Johnson v. Glick stated no threshold requirement of permanent injuries. The court refused to allow the district court to focus upon one factor, the extent of the injury without considering all factors. Nowhere did the court indicate that inspiration by malice or sadism was necessary in order to establish liability.

First Circuit: In Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986), the court applied to a substantive due process claim the "shocks the conscience" test and also applied the Johnson v. Glick factors, but held that it was not necessary to prove that defendant acted maliciously or

unnecessary or violent and will not require a finding of malice or bad motive. Fiacco v. City of Rensselaer, supra. The Ninth Circuit will continue to apply different standards to Fourth and Fifth Amendment cases involving

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sadistically. With regard to plaintiff's Fourth Amendment claim in that case, the court applied a reasonableness standard, balancing the public interest against the individual's right to personal security.

Third Circuit: In Black v. Stephens, 662 F.2d 181 (3rd Cir. 1981), decided under the Fourteenth Amendment liberty without due process of law, the court held that excessive force is such a conduct that "shocks the conscience" citing Rochin. Nowhere however did the court require proof of inspiration by malice or sadism.

Sixth Circuit: In Waggoner v. Mosti, 792 F.2d 595 (6th Cir. 1986), a case alleging excessive force both during and after arrest, the court approved a jury instruction which required finding that the amount of force used was grossly disproportionate to the need for force under the circumstances and that the amount of force used amounted to an abuse of official power that shocks the conscience. Nowhere did the court require proof of intent to injure or inspiration by malice and sadism.

excessive force which requires a reasonableness test analyzed in the light of factors such as the officer's requirement for safety, the motivation for the arrest, and the extent of injury inflicted in Fourth Amendment cases but

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Eighth Circuit: In Davis v. Forrest, 768 F.2d 257 (8th Cir. 1985), a 1983 action against two police officers for beating plaintiff with a flashlight, the court approved a "shocks the conscience" standard, citing the Fourth Circuit's decision in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), and approving an instruction which required the jury to consider the four factors of Johnson v. Glick, but stopped short of requiring proof of inspiration by malice or sadism as does Hall v. Tawney, supra, and the en banc court's majority opinion in the present case.

Tenth Circuit: In Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966), the court held, in a 1983 action for excessive force after arrest that a person unlawfully beaten by an arresting officer is denied the right of due process of law and further held that the reasonableness of the force used in making an arrest under all the circumstances is a question for the jury, and the standard is the conduct of ordinary prudent men under the existing

will not require a conduct that shocks the conscience of the court or consideration of the Johnson v. Glick factors in Fourth Amendment cases, but will require both in substantive due

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circumstances. In Trujillo v. Goodman, 825 F.2d 1453 (10th Cir. 1987), in contrast to Morgan v. Labiak, supra, the court held that some element of intent is required to show a constitutional violation in an excessive force case because it includes an inquiry into the motives of the state officer. This case, however, would allow such a finding to be made when either the force is inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience or is inspired by malice rather than mere carelessness. Even Trujillo v. Goodman appears to stop somewhat short of the absolute requirement of proof of inspiration by malice or sadism although it does come close to the majority opinion of the en banc court in the present case.

Eleventh Circuit: In Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc), an excessive force in arrest case, the court applied a "shocks the conscience" test from Rochin v. California, supra, to the substantive due process claims and applied the Johnson v. Glick factors to the substantive due process claims. The court did not require,

process cases. Compare, McKenzie v. Lamb, supra, with Smith v. City of Fontana, supra. The Fourth Circuit will continue to require, in Fourth, Fifth and Eighth Amendment cases, conduct that both shocks the conscience of the court and is specifically inspired by malice

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however, for a violation of substantive due process that there be a requirement of proof of inspiration by malice or sadism. The court also considered a Fourth Amendment claim and applied the standard of Tennessee v. Garner, supra, to determine if the seizure was unreasonable and required balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion. The court further held that in conducting this balancing test the court should consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted, citing Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1864, 60 L.Ed.2d 447 (1979).

or sadism in order to establish liability. The Seventh Circuit will continue the reasonableness approach of Lester v. City of Chicago in Fourth Amendment cases involving excessive force but may follow Gumz v. Morrissette in Fifth Amendment cases, and may draw a very technical line between the two.

The other circuits will continue to follow the different variations lying between the Fourth and Fifth Circuits' approaches and the approaches of the Second, Seventh and Ninth Circuits.

The confusion which now reigns in the federal appellate courts as to what is the proper standard to be used under the Fourth or Fifth Amendments to the United States Constitution in excessive force cases will continue to produce a flood of appellate litigation and will

give citizens of the United States, as a practical matter, widely varying constitutional protections against excessive force. Citizens fortunate enough to reside in the areas covered by the Second, Seventh and Ninth Circuits will have much greater protection than those who reside in the areas covered by the Fourth and Fifth Circuits. Thus, this important constitutional question has implications which are extremely broad and sweeping. The only way citizens of the United States can have their constitutional rights fully protected, and the present state of ocnfusion removed, is for the Supreme Court to resolve the conflict that presently exists between the circuits.

II. THE VAGUENESS OF SUCH PHRASES AS "INSPIRED BY MALICE AND SADISM" AND "SHOCKS THE CONSCIENCE OF A COURT" RENDERS THOSE TERMS SO CONFUSING, WHEN USED IN A FEDERAL JURY INSTRUCTION AS TO AMOUNT TO AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The panel opinion in the present case points out the confusion surrounding the use of phrases such as "shocks the conscience" or "shocks the conscience of a court." 793 F.2d at 577, 578, App. A-63. Judge Ervin notes that the "shocks the conscience" language of Rochin v. California, supra, is of questionable clarity in setting an ascertainable guide for a jury. Judge Ervin further notes that Smith v. Wade, 461 U.S. 30, 50-51, 103 S.Ct. 1625, 1637-38, 75 L.Ed.2d 632 (1983), suggests a vagueness challenge to an instruction imposing § 1983 liability if, inter

alia, the conduct "shocks the sensibilities." Judge Ervin further notes that, to the extent such language invites a jury to infer how a judge would react, the flaw is obvious. As pointed out in n. 5 to the panel opinion, it is impossible to ascertain from the "shocks the conscience" language of the jury instruction in the present case where the jurors thought they were to employ their personal norms, their view of the judge's norms, or their view of general, societal norms of "shocking behavior." App. A-64.

In an effort to resolve this problem, the panel opinion indicates that Rochin, 342 U.S. at 170-172, 72 S.Ct. at 208-210, makes it clear that the conscience at issue is the conscience of the community in light of

involving societal norms, not the conscience of any particular judge or court. The panel opinion further indicates that a "shocks the conscience" standard must be true to this concept in Rochin, and that the instruction in the present case was not.

Certainly "shocks the conscience of a court" is a very vague, confusing phrase, particularly when coupled with other equally vague and confusing phrases in a jury instruction where none of these phrases are defined. Indeed, a jury could conclude from such language that the standard for liability in excessive force cases is an emotional rather than reasonable standard based upon either the individual juror's conscience, the conscience of some particular judge, or possibly even the

emotional reaction which this Court might have.

The inclusion in the present jury charge of language such as "inspired by malice or sadism", together with that already generated by the "shocks the conscience of a court" language makes the charge even more confusing. In Norris v. District of Columbia, 737 F.2d at 1157, Judge Doyle, in his concurring opinion, points out that the inclusion of language in Johnson v. Glick such as "good faith," "malice," and "sadism" is thoroughly confusing. 737 F.2d at 1157 n. 5. Indeed, Judge Doyle, in his concurring opinion, states: "But is it suggested that the consitution condemns the application of force by government when one is justified or the application of excessive force, only in the absence

of good faith and the presence of malice and sadism?" 737 F.2d at 1157 n. 5. Furthermore, Judge Doyle states that only three factors of those set forth in Johnson v. Glick, supra, are the tests of constitutionality in excessive force cases. Those factors are: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; and (3) the extent of the injury inflicted insofar that it is probative of the amount of force used and that it bears on the sum to be awarded as damages. Id. at 1157.

Words such as "malice" and "sadism" are especially capable of being misunderstood by a jury. Indeed, the only understanding a jury would likely have of "inspired by malice or sadism" would be actual malice. Malice, of

course, has a legal definition which may be supplied by recklessness or gross negligence, Smith v. Wade, supra, but with requirement for inspiration of malice coupled with language like "grudge," "ill will," "spite" clearly indicates to jurors that at least hatred, possibly even deep-seeded hatred, must be present to find a constitutional violation.

The use of the word "sadism" in a jury instruction, when it is not defined, is even worse. Sadism carries with it connotations of torture or prolonged agony inflicted to satisfy some sexual desire, although it may also be used to refer to brutality or torture without sexual connotation. Unless the term is defined for a jury, however, there is no knowing how they would

interpret "motivation by sadism." The only definition for "sadism" given in Black's Law Dictionary is "that state of sexual perversion in man in which the sexual inclination manifests itself by the desire to beat, maltreat, humiliate and even kill the person with whom the passion is conceived." Black's Law Dictionary, 4th Ed. (1968), p. 1501. If the preceding is the generally accepted legal definition of "sadism," how can courts possibly expect jurors not to apply it? More significantly, how can jurors possibly apply terms such as "shocks the conscience of a court" and "inspired by malice and sadism" in any sort of consistent, objective manner.

The use of such vague, confusing and emotion-charged terms in a jury instruction can only invite the jury to

decide the case on the basis of each juror's emotional reaction to the evidence offered rather than on any consistent constitutional standard. The result would be to have plaintiffs in excessive force cases have their claims turned, not upon the law, but rather upon the feelings and emotions of the individual jurors without any clear guidance at all.

Clearly, due process requires a consistent constitutional standard applicable to all persons who allege excessive force violations rather than an unduly vague and confusing standard. Even if it did not, this Court, in the exercise of its supervisory power over the lower federal courts, ought not to allow jury instructions which are as vague,

confusing, and emotionally charged as those used in the present case. At a minimum, if such language is used, the lower court should be required to define these terms at least to the extent that Judge Ervin's panel opinion in the present case attempted to do. Petitioner believes, however, that such terms should not be used at all and has consistently objected to their use throughout the proceedings before the trial and appellate courts.

The Supreme Court should resolve this issue and hold that the use of phrases such as "shocks the conscience of a court" and "inspired by malice and sadism" are too vague and confusing to withstand scrutiny when used in a jury charge.

III. THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The en banc majority opinion below, App. A-2, directly conflicts with this Court's decision in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). In that case, the court held that for Fourth Amendment purposes the standard for liability was an objective standard of reasonable under the totality of the circumstances. Tennessee v. Garner requires a balancing test which requires that the nature and quality of the intrusion on the individual's Fourth Amendment interests be balanced against the importance of the governmental interests alleged to justify the intrusion. 471 U.S. at 8, 105 S.Ct. at 1699, 85 L.Ed.2d at 7. It is difficult to imagine a more direct conflict with an opinion of this Court

than that posed by the majority opinion below which still retains, for Fourth as well as Fifth Amendment purposes, a requirement of proof of inspiration by malice or sadism, coupled with proof of brutality which shocks the conscience of a court. Tennessee v. Garner, supra, contains no such requirements.

Furthermore, as Judge Phillips points out in his dissent to the en banc opinion below, App. A-18, a person does not lose all of his Fourth Amendment rights to be secure in his person against unreasonable searches and seizures when he becomes a pretrial detainee, citing Winston v. Lee, 470 U.S. 753, 755, 105 S.Ct. 1611, 1614, 84 L.Ed.2d 662 (1985).

Judge Phillips further points out that Terry v. Ohio, 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed.2d 889 (1967), has long since settled that a seizure of a person within the Fourth Amendment's meaning is not limited to a technical arrest, but includes any activity which "'by means of physical force...has in some way restrained the liberty of a citizen,' id. at 19 and n. 16, 88 S.Ct. at 1879 and n. 16." App. A-40-42.

The Supreme Court has implicitly recognized that there may be a succession of seizures in a police-citizen encounter, citing Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977); see also id. at 116 n. 2, 98 S.Ct. at 336 n. 2 (Stevens, J., dissenting). Based upon this case, as well as the Ninth Circuit opinion in Robins v. Harum, supra, and the Seventh Circuit opinion in Lester v.

City of Chicago, supra at 713 n. 7, Judge Phillips is of the opinion that Fourth Amendment protections against the unreasonable use of force applies throughout the period during which Gary Justice was in the custody of Troopers Rose and Dennis, and thus the Fourth Amendment protections of Tennessee v. Garner, supra, apply. App. A-19-46.

Even if Petitioner's claim in the present case falls within the substantive due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution to be free of deprivation of liberty without due process of law, the majority en banc opinion below nonetheless conflicts with this Court's decisions in Block v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984), and Bell v.

Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Although Block v. Rutherford and Bell v. Wolfish determine where jail conditions rather than excessive force cases, they clearly established the constitutional standard to be used with regard to the substantive due process rights of pretrial detainees. In Block v. Rutherford, the Court reaffirmed its holding in Bell v. Wolfish that where it has been alleged that a pretrial detainee was deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice or policy amounted to punishment, for under the due process clause pretrial detainees may not be punished prior to an adjudication of guilt in accordance with due process of

law. Block v. Rutherford, 468 U.S. at 583, 82 L.Ed.2d at 445, citing Bell v. Wolfish, 441 U.S. at 535, 60 L.Ed.2d 447, 99 S.Ct. 1861. The court in Block v. Rutherford, referring to its decision in Bell v. Wolfish, supra, went on to state:

> Specifically, we observe that '[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose' id., at 538, 60 L.Ed.2d 447, 99 S.Ct. 1861 (citation omitted). Absent proof of intent to punish, we know that this determination will "generally turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" Ibid. (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963)). 468 U.S. at 584, 82 L.Ed.2d at 445.

Block v. Rutherford, supra, was a case involving state pretrial detainees while Bell v. Wolfish, supra, was a case involving federal detainees. Both cases, however, clearly show that the proper constitutional standard to be applied in substantive due process cases to pretrial detainees is whether or not the actions of the state officials amount to punishment. Both cases further hold that proof of intent to punish is not necessary in order to find a due process violation and in the absence of such proof of intent to punish, the Court should consider whether an alternative purpose may be assigned to the action and whether the action appears excessive in relation to the alternative purpose assigned to it. Although the wording of this

instruction is somewhat different from the reasonableness under the totality of the circumstances, and the balancing of competing state interests standard of Tennessee v. Garner, supra, the inquiry under the due process clause appears to be very similar to that of Tennessee v. Garner.

It would be irrational to attempt to distinguish Block v. Rutherford, supra, and Bell v. Wolfish, supra, on the grounds that they were condition cases while the present case is excessive force. All of these cases involved pretrial detainees, and it seems beyond question that a pretrial detainee could suffer as much or more punishment from the application of excessive force to his person as he could suffer from jail conditions.

Of course, Block v. Rutherford, supra, and Bell v. Wolfish, supra, warned that with regard to specific restrictions reasonably related to security interests, the Court should ordinarily defer to the expert judgment of prison administrators and officials. See, e.g., Block v. Rutherford, 468 U.S. at 584-585, 82 L.Ed.2d at 446. Of course, such language about deference to prison administrators and officials when devising general regulations relating to security interests should not apply to cases such as the present one where there was no allegation that Onslow County jail officials had any policy, regulation or practice of inflicting physical force on prisoners.

There can be no doubt that the opinion below, requiring conduct which shocks the conscience and which was inspired by malice or sadism to show a substantive due process violation of a pretrial detainee's rights, conflicts with the standard set by this Court for evaluating pretrial detainees' substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Thus, even if the Court were to determine that Gary Justice had no Fourth Amendment rights implicated by this situation, the Court should nonetheless grant certiorari because the en banc majority opinion below, App. A-2, conflicts with the substantive due process standard

established by this Court in Bell v. Wolfish, supra, and Block v. Rutherford, supra.

## CONCLUSION

For these various reasons, the petitiion for certiorari should be granted.

Respectfully submitted.

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